SUPREME COURT, U. S.
MAY 11 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

CASE NO. 75-1401

PAUL LEE SWEENY, *Petitioner*

V.

FRANCIS D. LENTINI,
LAWRENCE R. KEENAN, and
GLEN SHENK
Respondents

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, IN AND FOR THE FOURTH CIRCUIT

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PETITIONER'S REPLY TO RESPONDENTS'BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

A. INTRODUCTION

The Petitioner, Paul Lee Sweeny, respectfully submits this reply to the respondents' brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. The petitioner would show the Court that the contentions made in respondents' brief are wholly unsupported by the record in this case and are clearly erroneous. The petitioner would also represent to the Court that it is clear that the decision of the United States Court for Appeals for the Fourth Circuit is in conflict with decisions of this Court and decisions of other Courts of Appeals.

Additionally, as already demonstrated by the petition for writ of certiorari, the Fourth Circuit has decided important questions of federal law and procedure which have not been, but should be settled by this Court. The Court of Appeals has failed to consider whether pretrial summary judgment can be granted under Rule 56, Federal Rules of Civil Procedure, by a District Judge finally dismissing petitioner's complaint for damages with prejudice where the District Judge did not hear oral argument on the motion after it had been requested by all parties. In addition, the Fourth Circuit has not considered the decisions of this Court holding that the Double Jeopardy Clause of the Fifth Amendment includes the doctrine of collateral estoppel; and it has granted a county housing and

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licensing official absolute immunity for repeatedly violating petitioner's right to be protected from Double Jeopardy. By its failure to consider petitioner's right to oral argument of respondents' motion for summary judgment, under Rule 56 of the Federal Rules of Civil Procedure; by its failure to embody the doctrine of collateral estoppel in the Double Jeopardy Clause; and by its grant of absolute immunity to respondent Lentini for violating petitioner's right not be placed in Double Jeopardy, the Fourth Circuit has erroneously decided important federal questions by concluding that petitioner had no cause of action against any of the respondents.

B. REASONS FOR GRANTING THE WRIT

(a) Respondents' "facts" not in the record.

Petitioner will not repeat the argument already contained in his petition for writ of certiorari. However, petitioner does desire to reiterate the fact that none of the respondents adduced any evidence at the trial below. Accordingly, when under the guise of "facts", respondents repeatedly refer to what they say Gary Davis, Assistant Commonwealth Attorney, did or advised (page 7 of respondents' brief); to what they say Judge Morris did or advised; to what they say was contained in various "affidavits", or to what they say respondents' "photographs" show, respondents have indulged in sheer fantasy in an attempt to mislead the Court as to what transpired in the Trial Court. There were no "affidavits" introduced in evidence in this case by either petitioner or by respondents at the trial;

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the "photographs" referred to by respondents are not in evidence; and, in fact, there is no evidence at all in this case controverting petitioner's evidence adduced in the Trial Court. This is made crystal clear by the Trial Judge's remarks to respondents' counsel during oral argument of respondents motion for a directed verdict, at page 85 of the Transcript of Proceedings in the Trial Court, as follows:

"Mr. Brandt: (counsel for respondents).

" * * * How can we expect this man (respondent Lentini) in each case didn't do this on his own, Judge. He did it after a judge told him it was a continuing offense. He did it after the assistant commonwealth attorney drafted the summons for him.

"The Court: There is no evidence as to that yet in this case. There is your opening statement and it may be that is what the evidence will show."

Notwithstanding the foregoing admonition by the Trial Judge of the impro-

priety of the argument of respondents' counsel, they still persist in making the same argument even in this Court.

(b) Rule 56, Federal Rules of Civil Procedure, entitles a litigant to argument before a summary judgment dismissing his case with prejudice can be granted.

The argument in support of the above proposition set forth on pages 13-15 of the petition for writ of certiorari will not be repeated here. Respondents cite Rule 78 of the Federal Rules of Civil Procedure and Local Rule 11R in support of their contentions that summary judgment finally dismissing a litigant's complaint with prejudice can be granted without oral argument after request for oral argument has been made. Rules 56 and 78 must be read with Rule 83 of the Federal Rules of Civil Procedure, which latter Rule respondents fail to mention.

Rule 83, Federal Rules of Civil Procedure provides that the District Courts can make no rules inconsistent with the Federal Rules of Civil Procedure. Respondents also fail to mention Local Rule 11G of the United States District Court for the Eastern District of Virginia, which specifically provides for oral argument on Motions for Summary Judgment. Two circuit courts of appeals have held that it is reversible error to grant summary judgment dismissing a case on its merits with prejudice without affording a hearing when requested. It is therefore respectfully submitted that this Court, pursuant to its supervisory power over all questions concerning the application and interpretation of the Federal Rules of Civil Procedure, should settle this important question arising under Rule 56.

(c) The Burden of Proving "Good Faith" is on Respondent Lentini who introduced no evidence in the Trial Court.

Contrary to assertions contained in respondents' brief, no court has ever held that a county official such as respondent Lentini enjoys absolute immunity from damage suits arising under Title 42, Sections 1983 and 1985 of the United States Code. To accord absolute immunity in the case of respondent Lentini would completely emasculate the Act and constitute a judicial repeal of the same. Said respondent is entitled only to the qualified defense of good faith and probable cause, and he has the burden of alleging and proving such qualified defense. In Williams v. Hilliard, 516 F. 2d 1344 (C.A.6, 1975), there was a damage award against both the prosecutor and state investigator

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for unconstitutionally withholding exculpatory evidence. This Court denied the state investigator's petition for a writ of certiorari, based on his claim that he only followed the prosecution's orders, the same claim made by respondent Lentini in this case, thereby refusing to accord the state investigator the absolute immunity which the Fourth Circuit has in effect accorded respondent Lentini in the instant case by upholding the Trial Court's dismissal as to Lentini without requiring him to prove his asserted qualified defense of good faith and probable cause.

(d) Petitioner has thrice been put in jeopardy by the conduct of said respondent and others, in violation of his Constitutional right to be protected against Double Jeopardy.

Respondents, by their admissions in the Trial Court, have conceded that respondent Lentini's three criminal prosecutions of petitioner under the same section 1309.1 of the BOCA building code for the same condition of the same property was wrongful. Thus, at pages 102 et seq. of the Transcript of Proceedings in the Trial Court, the following appears:

"The Court: * * *

"Is there any indication that Mr. Lentini intends to try to enforce 1309.1 against Mr. Sweeny?

"The county is here. Some representative of the county is here. What is their position on what Mr. Lentini intends to do with regard to 1309.1?

"Mr. Symanski (Assistant County Attorney):

"I have no indication that Mr. Lentini is going to proceed under that section against Mr. Sweeny, no, your Honor.

"The Court: I want something a little stronger than that.

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"Mr. Symanski: We will represent that Mr. Lentini will not proceed under 1309.1 under the same set of facts and the same property.

"The Court: Against Mr. Sweeny?

"Mr. Symanski: Right.

"The Court: All right. That strengthens my determination that the injunction should be denied* * *

"Mr. Sullivan: Your Honor, may I ask to get in the record - -

"The Court: -- will be denied.

"Mr. Sullivan: - - in the record that this is the same factual situation on all three things, and that is the basis and the fact. I want that just in case we desire to pursue it further."

If, as respondent Lentini's counsel had admitted, Lentini cannot prosecute petitioner again under section 1309.1 of the BOCA building code, it follows, under the doctrine of collateral estoppel, that Lentini cannot again prosecute petitioner for any alleged violation based on the same condition of the same property, no

matter what alleged criminal law he proceeds under. It likewise follows from the foregoing that the second and third criminal prosecutions of petitioner by respondent Lentini, after petitioner's acquittal at the first trial following the testimony of three witnesses for the prosecution, and after jeopardy had attached, violated petitioner's right not to be twice put in jeopardy for the same alleged offense, since the condition of the property, which was the subject matter of each prosecution admittedly never changed but remained the same throughtout all three trials.

(e) Respondents Keenan and Shenk should not be entitled to absolute immunity from claims for damages or injunctive relief under Title 42, Sections 1983 and 1985, U.S.C. under the facts of this case.

The allegations of the complaint

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against respondent Shenk appear on page 7 of the petition, and the allegations against respondent Keenan appear on page 8 thereof. The advance sheets of 96 Supreme Court Reporter pages 943-1153, containing the report of this Court's decision in Imbler v. Pachtman, No. 74-5435, decided by this Court on March 2, 1976, did not reach the office of petitioner's counsel until April 14, 1976, 12 days after the petition was filed herein, and hence that decision was not discussed in said petition. As counsel read Imbler, however, the absolute immunity accorded a prosecutor applies only to acts performed by him within the scope of his duties. And the magistrate Shenk does not have absolute immunity at all. The Fourth Circuit, in McCray v. Maryland,456 F2d 1 (4 Cir. 1972), has held that a court clerk is

amenable to a damage suit under Title 42, Section 1983, U.S.C., thereby denying the clerk absolute immunity.

The allegations made under oath against respondent Keenan, which he has never denied under oath, clearly involve conduct outside the scope of his duties. There is no reason known to petitioner's counsel to afford a prosecutor absolute immunity for intentional wrongul conduct where he deliberately and knowingly misleads the court as to the nature of prior proceedings and by misrepresentation, conceals from the court facts which would have exculpated petitioner. Such conduct on the part of the prosecutor would appear no different in principle from any other tortious conduct committed by a prosecutor during the course of a trial, as, for example, committing an assault on opposing counsel or some by-

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stander in the court room. And no immunity from the grant of the injunctive relief sought by petitioner against all respondents exists in any case.

CONCLUSION

The opinion and judgment of the Fourth Circuit effectively denies petitioner all relief, notwithstanding the clear showing herein of violations of petitioner's constitutional right not to be put in jeopardy more than once for the same alleged offense. Unless respondents are prevented from doing so, by the grant of certiorari herein or summary reversal of the Fourth Circuit, it is submitted that petitioner is in danger of being subjected to further prosecutions at the hands of respondents, or some of them, for the same condition of the same property, a charge of which he has been three times

acquitted, notwithstanding petitioner's clear constitutional right not to be put in jeopardy more than once for the same alleged offense.

It is submitted that the opinion of the Fourth Circuit is in error and certiorari should be granted.

Respectfully submitted,

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May , 1976.